

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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CALVARY CHAPEL LONE MOUNTAIN

Plaintiff(s),

v.

STEPHEN F. SISOLAK
AARON DARNELL FORD
JUSTIN LUNA

Defendant(s).

Case No. 2:20-cv-00907-RFB-VCF

ORDER

I. INTRODUCTION

Before the Court is Plaintiff Calvary Chapel Lone Mountain's Emergency Motion for Preliminary Injunction. ECF No. 11. For the following reasons, the Court denies the motion without prejudice.

II. PROCEDURAL BACKGROUND

Plaintiff brought its complaint on May 20, 2020. ECF No. 1. The complaint asserted various federal and state constitutional challenges to Governor Sisolak's emergency directives in response to the COVID-19 pandemic. Plaintiff filed its motion for a preliminary injunction on May 21, 2020. ECF No. 11. On May 27, 2020, the Court directed that Plaintiff provide a supplement to its motion in light of Governor Sisolak's revised emergency directives allowing places of worship to resume in-person services. ECF No. 13. Plaintiff provided its supplement and Defendants responded. ECF Nos. 15 – 18. The Court held a hearing on the motion on June 9, 2020. This written order now follows.

III. FACTUAL BACKGROUND

The Court makes the following findings of fact. Plaintiff Calvary Chapel Lone Mountain is a church located in Las Vegas, Nevada. On May 26, 2020, Defendant Governor Sisolak announced that Nevada would enter “Phase Two” of its reopening. To that end, he issued Emergency Directive 021 on May 28, 2020 (hereinafter the “Emergency Directive” or “Directive”). The Emergency Directive permits several categories of business and social activity to resume, subject to different restrictions. For example, Section 10 of the directive prohibits gatherings in groups of more than fifty in any indoor or outdoor areas. Emergency Directive, § 10. Communities of worship and faith-based organizations are allowed to conduct in-person services so that no more than fifty people are gathered, while respecting social distancing requirements. Id. at § 11. Section 20 similarly limits movie theaters to a maximum of 50 people. Id. at §20. Section 35 of the Emergency Directive allows casinos to reopen at 50% their capacity and subject to further regulations promulgated by the Nevada Gaming Control Board. Id. at § 35.

Calvary argues that the directive treats other secular businesses better than churches, as several other secular businesses are not subject to a fifty-person cap, but instead have an occupancy cap of up to 50% of their building capacity. Such distinctions, Calvary argues, violate Calvary’s federal and state constitutional rights. Calvary therefore seeks an injunction from this Court that would allow Calvary to adopt its own safety plan, which would increase occupancy to 50% of building capacity and allow attendance only by reservation, among other changes. Calvary also desires that the Court “enter an Order adopting guidelines substantiated by empirical data . . . and . . . based on fire code.” Pl’s Suppl. 11.

1 IV. LEGAL STANDARD

2 A preliminary injunction is “an extraordinary remedy that may only be awarded upon a
3 clear showing that the plaintiff is entitled to such relief.” Winter v. Natural Res. Def. Council, Inc.,
4 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish four elements:
5 “(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer irreparable harm
6 in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that
7 the public interest favors an injunction.” Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758
8 F.3d 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing Winter, 555 U.S. 7, 20
9 (2008)). A preliminary injunction may also issue under the “serious questions” test. Alliance for
10 the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the continued viability
11 of this doctrine post-Winter). According to this test, a plaintiff can obtain a preliminary injunction
12 by demonstrating “that serious questions going to the merits were raised and the balance of
13 hardships tips sharply in the plaintiff’s favor,” in addition to the other Winter elements. Id. at
14 1134–35 (citation omitted).

18 V. DISCUSSION

19 The Court denies the motion because it does not find that Calvary has demonstrated a
20 likelihood of success on its federal constitutional claims and declines to exercise supplemental
21 jurisdiction over Calvary state constitutional claims.

23 a. Equal Protection

24 “Under the Equal Protection Clause of the Fourteenth Amendment, all persons similarly
25 situated should be treated alike.” Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 804 (9th
26 Cir. 2011) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). “A showing
27 that a group was singled out for unequal treatment on the basis of religion,” supports a valid equal
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1 protection claim. Alpha Delta, 648 F.3d at 804.

2 Although the case concerned the applicability of the Free Exercise Clause of the First
3 Amendment rather than an Equal Protection claim, the Supreme Court’s decision in South Bay
4 United Pentecostal Church v. Newsom guides this Court’s analysis. No. 19A1044, 2020 WL
5 2813056 (May 29, 2020).
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7 The Free Exercise Clause of the First Amendment provides that “Congress shall make no
8 law respecting an establishment of religion or prohibiting the free exercise thereof.” Am. Family
9 Ass’n, Inc v. City & Cty. of San Francisco, 277 F.3d 1114, 1123 (9th Cir. 2002) (citing U.S. Const.
10 amend. I). A regulation or law violates the Free Exercise clause when it is neither neutral nor
11 generally applicable, substantially burdens a religious practice, and is not justified by a substantial
12 state interest or narrowly tailored to achieve that interest. Id. (citing Church of Lukumi Babalu
13 Aye, Inc. v. Hialeah, 508 U.S. 520, 531 – 32 (1993)).
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15 The Constitution principally entrusts “[t]he safety and the health of the people” to the
16 politically accountable officials of the States “to guard and protect.” Jacobson v. Massachusetts,
17 197 U. S. 11, 38 (1905). When state officials “undertake[] to act in areas fraught with medical and
18 scientific uncertainties,” their latitude “must be especially broad.” Marshall v. United States, 414
19 U. S. 417, 427 (1974).
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21 The Supreme Court examined the relationship between COVID-19 related executive orders
22 and the Free Exercise Clause in its recent order in South Bay. In South Bay, the Supreme Court
23 denied an application for injunctive relief enjoining enforcement of a portion of the California
24 governor’s executive order to limit the spread of COVID-19. Id. The order limited attendance at
25 places of worship to 25% of building capacity or a maximum of 100 attendees. Id. at 1. The
26 Supreme Court found that the restrictions appeared consistent with the Free Exercise Clause of the
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1 First Amendment. Id. Chief Justice Roberts first noted that “[s]imilar or more severe restrictions
2 apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator
3 sports, and theatrical performances, where large groups of people gather in close proximity for
4 extended periods of time.” Id. Chief Justice Roberts then explained that the “[o]rder exempts or
5 treats more leniently only dissimilar activities, such as operating grocery stores, banks or
6 laundromats, in which people neither congregate in large groups nor remain in close proximity for
7 extended periods.” Id. Finally, Chief Justice Roberts concluded that, “[t]he precise question of
8 when restrictions on particular social activities should be lifted during the pandemic is a dynamic
9 and fact-intensive matter subject to reasonable disagreement,” and that when elected officials “act
10 in areas fraught with medical and scientific uncertainties,” their latitude “must be especially
11 broad.” Id. (internal citations omitted). “When those broad limits are not exceeded, they should
12 not be subject to second-guessing by an “unelected federal judiciary, which lacks the background,
13 competence and expertise to assess public health and is not accountable to the people.” Id.

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17 The Court finds the holding in South Bay applicable to this case. The Court finds the
18 Emergency Directive is neutral and generally applicable and therefore does not give rise to a valid
19 equal protection claim. Consequently, the Court finds that Plaintiff has not demonstrated a
20 likelihood of success on the merits of its claim.

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22 Calvary argues that the Defendants in this case, based upon the plain language of the
23 Emergency Directive, have violated the First Amendment by ‘exceeding the limits’ of their
24 authority during a public health crisis. Calvary bases its argument on alleged differential treatment
25 between itself and other secular organizations/activities. Calvary points to several secular
26 businesses that it insists engage in comparable activity in which people gather in large groups and
27 remain in close proximity for large periods of time, including casinos, restaurants, nail salons,
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1 massage centers, bars, gyms, bowling alleys and arcades, all of which are allowed to operate at
2 50% of official fire code capacity. Calvary specifically focuses on casinos. Given that any social
3 behavior increases the risk of covid-19 transmission, Calvary argues, there is no scientific or
4 medical reason to distinguish between places of worship and other comparable activities.
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6 The Court agrees that church services may in some respects be similar to casinos, in that
7 both are indoor locations in which a large number of people may remain in close proximity for an
8 extended period of time. The Court, however, disagrees that casinos are actually treated more
9 favorably than places of worship. During this phased reopening of Nevada by the Governor,
10 casinos are subject to substantial restrictions and limitations required by the Nevada Gaming
11 Control Board which exist *in addition* to and in conjunction with the requirements and oversight
12 provided by the Emergency Directive. See Emergency Directive, § 35; Addendum to April 21,
13 2020 Policy Memorandum posted May 29, 2020; 2020-30 Updated Health and Safety Policies for
14 Reopening after Temporary Closure posted May 27, 2020; Health and Safety Policy for the
15 Resumption of Gaming Operations Nonrestricted Licensees posted May 27, 2020; Procedures for
16 Reopening after Temporary Closure Due to COVID-19 posted April 21, 2020, Gaming Control
17 Board. Such additional regulatory policies set forth requirements related not only to the social
18 distancing and placement of table games or slot machines in the casino, for example, but they also
19 set forth requirements regarding training of the employees, financial operations and other internal
20 operations of casinos. Id. These casinos are also subject to regular and explicit inspection of all
21 aspects of the respective casino's reopening plan. Id. Indeed, gaming companies are one of the few
22 categories of organizations in which the directive specifically discusses enforcement and
23 punishment alternatives for violating the directive and concomitant promulgated regulations.
24 Emergency Directive, §35. Casinos are therefore subject to heightened regulation and scrutiny
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1 under these guidelines in comparison to churches, regardless of the difference in occupancy cap.
2 The Court finds that while Plaintiffs focus on the fifty-person cap for their clients, they fail to
3 consider the totality of restrictions placed upon casinos in their comparative analysis. Thus, even
4 if the Court were to accept casinos as the nearest point of comparison for its analysis of similar
5 activities and their related restrictions imposed by the Governor, the Court would nonetheless find
6 that casinos are subject to much greater restrictions on their operations and oversight of their entire
7 operations than places of worship.
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9 The Court also finds that other secular entities and activities similar in nature to church
10 services have been subject to similar or more restrictive limitations on their operations. The Court
11 notes that church services consist of activities, such as sermons and corporate worship, that are
12 comparable in terms of large numbers of people gathering for an extend period of time to lectures,
13 museums, movie theaters, specified trade/technical schools, nightclubs and concerts. All of these
14 latter activities are also subject to the fifty-person cap or remain banned altogether under
15 Emergency Directive. See Emergency Directive, §§ 20, 22, 27, 30, 32. Given that there are some
16 secular activities comparable to in-person church services that are subject to more lenient
17 restrictions, and yet other activities arguably comparable to in-person church services that are
18 subject to more stringent restrictions, the Court cannot find that the Emergency Directive is an
19 implicit or explicit attempt to specifically target places of worship. Lukumi, 508 U.S. at 534
20 (striking down city council ordinance that specifically targeted and forbid animal sacrifices made
21 by a particular religious group). Additionally, whether a church is more like a casino or more like
22 a concert or lecture hall for purposes of assessing risk of COVID-19 transmission is precisely the
23 sort of “dynamic and fact-intensive” decision-making “subject to reasonable disagreement,” that
24 the Court should refrain from engaging in. South Bay, 2020 WL 2813056, at 1. As the Court finds
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1 that the Emergency Directive is neutral and generally applicable, there is no actionable facial Equal
2 Protection Claim, and Calvary has therefore not demonstrated a likelihood of success on the merits
3 of this claim.

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5 **b. As-Applied Equal Protection Challenge: Selective Enforcement**

6 Calvary also brings an as-applied challenge. Specifically, Calvary points to what it alleges
7 is a lack of enforcement of the section of the Emergency Directive banning more than 50 people
8 from gathering, whether inside or outside, during recent protests. But in order to demonstrate
9 selective enforcement, it is not enough for Calvary to demonstrate that the directive is not being
10 enforced against secular activities. Calvary must also demonstrate that Defendants are *only or*
11 *primarily enforcing* the directive against places of worship. See Stormans, Inc v. Wiseman, 794
12 F.3d 1064, 1083 (9th Cir. 2015) (finding no evidence of selective enforcement against religiously
13 affiliated pharmacies in enforcement of drug delivery rules). In its briefing Calvary alleges that the
14 Attorney General's office stated that arrests would be made if the church was to exceed its fifty
15 person-cap. But this allegation is not supported by admissible evidence in the form of a declaration
16 by someone with personal knowledge of the events and Defendants dispute the validity of
17 Calvary's stated version of events. Absent more evidence from Calvary that Defendants have
18 actually enforced Emergency Directive only against places of worship, the Court cannot find that
19 Calvary has a likelihood of success on the merits of its as-applied Equal Protection challenge. If
20 Calvary does in fact have evidence of a pattern of selective enforcement against it, nothing in this
21 order shall prohibit it from returning to the Court with that evidence and filing a new motion for a
22 preliminary injunction.
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c. Right to Travel Fifth Amendment

“The Fifth Amendment right to travel protects the right of a citizen of one state to enter and to leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.” Saenz v. Roe, 526 U.S. 489, 500 (1999).

The Court finds that Plaintiff has raised no cognizable right to travel claim based on the facts alleged in the complaint and in the motion for preliminary injunction, and therefore does not find a likelihood of success on the merits of this claim and does not find it to be a valid ground on which to grant the injunction.

d. Fifth and Fourteenth Amendment Due Process Claims

Calvary’s final federal constitutional claim¹ is a Fifth and Fourteenth Amendment due process claim. The Court also finds that Calvary has failed to demonstrate a likelihood of success on the merits of its due process claim. The Supreme Court in Jacobson v. Massachusetts, and more recently in South Bay, has made clear that the state has broad authority to pass emergency measures to protect public health, and will not upset that authority absent clear excess of constitutional boundaries. 197 U.S. 11, 38 (1905). Because the Court finds for the reasons stated above that the Emergency Directive is a valid use of state police power, it finds that there is no due process violation.

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¹ Plaintiff also raised a Takings Claim in the complaint but did not brief it in the preliminary injunction briefing. Pl.’s Compl. at 24. The Court therefore declines to address the claim.


1 **e. State Constitutional Claims**

2 Calvary also brought several state constitutional claims. The Court is extremely reluctant
3 to order injunctive relief based on its construction of state law issues that have not been presented
4 to the Nevada Supreme Court, especially as the Court has already determined that Calvary has no
5 likelihood of success on any of its federal claims. See 28 U.S.C. § 1367(c)(2) (noting that federal
6 court may decline to exercise supplemental jurisdiction if the claim raises a novel or complex issue
7 of State law). For this reason, the Court declines to assert supplemental jurisdiction over Calvary's
8 state law claims.
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11 **VI. CONCLUSION**

12 **IT IS THEREFORE ORDERED** that Plaintiff Calvary Chapel Lone Mountain's
13 Emergency Motion for Preliminary Injunction (ECF No. 11) is DENIED.

14 DATED June 11, 2020.

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18 **RICHARD F. BOULWARE, II**
19 **UNITED STATES DISTRICT JUDGE**
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